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IN THE

Supreme Court of the United States

October Term 1983

Roy E. Davis, Individually and
Trading as Roy E. Davis, Seafood,

Petitioner

V.

UNITED STATES OF AMERICA and its
Agency the United States Air Force

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
of Virginia,

Respondents

and

HAMPTON ROADS SANITATION DISTRICT,

Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

James E. Bradberry
MOORE, MOORE AND BRADBERRY
13185 Warwick Boulevard
Newport News, Virginia 23602-0100
(804) 877-0255

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

QUESTION PRESENTED

Does the decision of the United States Supreme Court in Middlesex County Sewerage Authority, et al v. National Sea Clammers Association, et al, eliminating private causes of action under the Federal Water Pollution Control Act, also preclude recovery for damages under the Federal Tort Claims Act, when the damages arise from water pollution caused by the United States?

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U.S. Const. Art. III, § 2 3

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United States Code Congressional and Administrative News, 92nd Congress, Second Session, Volume 2, Legislative History, pages 3746 and 3747 17

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

ROY E. DAVIS, Individually and
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DECISIONS BELOW

The United States District Court for

the Eastern District of Virginia, on April 13, 1982, found for the respondent the United States. (App. p. 22a)

On appeal the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Eastern District of Virginia. (App. p. 26a)

QUESTION PRESENTED

Does the decision of the United States Supreme Court in Middlesex County Sewerage Authority, et al v. National Sea Clammers Association, et al, eliminating private causes of action under the Federal Water Pollution Control Act, also preclude recovery for damages under the Federal Tort Claims Act, when the damages arise from water pollution caused by the United States?

GROUNDS FOR JURISDICTION

The petitioners petition the Supreme

Court of the United States for a Petition for a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Fourth Circuit, which decision was handed down the 14th day of September, 1983.

Jurisdiction of the Federal Courts is based upon the Federal Tort Claims Act, 23 U.S.C. 1346(b) and 28 U.S.C. 2671, et seq. Venue is based upon 28 U.S.C. 1391 (e).

Jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals for the Fourth Circuit is based upon 28 U.S.C. § 1254(1) and on the U.S. Const., Art. III, § 2, cl. 2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves are as

follows:

28 U.S.C. § 1331

28 U.S.C. § 1346(b)

28 U.S.C. § 2674

28 U.S.C. § 2680

33 U.S.C. § 1365(e)

Title 21, Sec. 218, Code of Va., 1950, as amended

Title 21, sec. 223, Code of Va., 1950, as amended

Title 62.1, Sec. 44.3(6), Code of Va., 1950, as amended

Title 62.1, Sec. 44.5, Code of Va., 1950, as amended

STATEMENT OF THE CASE

Petitioner Roy E. Davis (hereinafter "Davis") is engaged in the seafood business in Back River, a tributary of the Chesapeake Bay, and does business as Roy E. Davis Seafood.

His principal business is the purchasing of polluted clams, pursuant to Commonwealth of Virginia supervision, trans-

planting said clams from polluted waters to Back River, where the clams are cleaned; and resale of the clams to the public. Normal cleansing time is about 15 days.

Respondent United States, through its instrumentality, Langley Air Force Base (hereinafter "Langley"), fronts on said River. Further, said river is bordered by the City of Hampton (hereinafter "Hampton").

The United States operates a sewage collection system and pumping facilities at Langley. Sewage and wastes are pumped into sewage lines owned and controlled by Hampton Roads Sanitation District (hereinafter "HRSD"). However, on at least 9 separate occasions between February 25, 1979 and September 6, 1979, untreated sewage in excess of 17 million gallons was dumped into the Back River by

the United States. As a result of the discharges, Back River was closed by the Virginia State Health Department until such time as the colliform bacterial level was reduced to limits determined by the department to be safe.

On June 22, 1979, the Environmental Protection Agency found that Langley had violated the Federal Water Pollution Control Act (hereinafter "FWPCA") by discharging untreated sewage into the Back River, and ordered compliance with the act. However, some incidents of dumping occurred after that finding and warning.

Between January 1, 1979 and July 31, 1980, more than 400,000 gallons of raw sewage were discharged into the Back River, on at least 28 separate occasions, by Hampton. The discharges by Hampton, in conjunction with the discharges by the

United States, created the pollution problem aforementioned.

As a result of such actions, Petitioner was caused substantial damage and compelled to close his business.

On September 13, 1979, Davis submitted his claim for damages to the United States. On May 6, 1980, the claim was rejected by the United States and Davis was advised of his right to sue under the Federal Tort Claims Act.

Further, Davis complied with the notice requirements of the FWPCA with regard to the United States and Hampton, and notified the City of Hampton, in accordance with Virginia law, that it was illegally discharging pollutants into a navigable waterway.

On October 27, 1980, Davis instituted action in the United States District Court for the Eastern District of Vir-

ginia against the United States and the City of Hampton, alleging that untreated sewage flowing from Langley and Hampton contaminated the shellfishing grounds in which Davis conducted his business, causing said shellfishing grounds to be closed, and resulting in, substantial damage.

Respondent United States admitted jurisdiction under the Federal Tort Claims Act (App. p. 10a) and elected to file a third-party complaint against Hampton Roads Sanitation District, a political subdivision of the Commonwealth of Virginia, and the agency responsible for accepting and treating sewage from all of the localities on the Peninsula including Hampton, and Langley.

Additionally, each of the respondents filed motions to dismiss under Rule 12, and the City of Hampton moved to dismiss

under Rule 19 for failure to join essential parties, asserting that the non-joinder of all persons bordering Back River constituted a violation of Rule 19 for which the suit should be dismissed as to them.

Each of respondents motions were responded to in timely fashion. On March 22, 1982, the United States moved to dismiss on new jurisdictional grounds, alleging the absence of tort jurisdiction and citing in support thereof the decision of the United States Supreme Court in Middlesex County Sewerage Authority et. al. v. National Sea Clammers Association et. al., 453 U. S. 1 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981).

By Memorandum Order, dated April 13, 1982, the District Court granted the motion of the United States and dismissed the suit on the grounds of lack of jur-

isdiction. (App. p. 31a) The action against the City of Hampton was likewise dismissed, without prejudice, the pendent jurisdiction supporting that action having been destroyed upon dismissal of the suit against the United States.

By Per Curian decision of September 14, 1983, the Fourth Circuit Court of Appeals affirmed the District Court. (App. p. 38a).

ARGUMENT

THE DECISION IN MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. V. NATIONAL SEA CLAMMERS ASSOCIATION ET AL., WHILE ELIMINATING PRIVATE CAUSES OF ACTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT, HAS NO SUCH ADVERSE EFFECT ON A CLAIM FOR DAMAGES RESULTING FROM POLLUTION AND INSTITUTED AGAINST THE OFFENDING PARTY UNDER THE FEDERAL TORT CLAIMS ACT.

Counsel for Petitioner will concede

that the effect of Middlesex County Sewerage Authority, et al. v. National Sea Clammers Association, et al, 453 U. S. 1, 69 L.Ed. 2d. 435 101 S. Ct. 2615, (1981), other than enforcement suits, under the Federal Water Pollution Control Act (herinafter the FWPCA), 33 U.S.C. 1251 et seq., and to eliminate the concept of a federal common law of nuisance as a jurisdictional basis for individual citizens suits complaining of water pollution. Reviewing the legislative history of the FWPCA, the Court discussed the opportunity of citizens to enforce pollution standards under Sections 1365(a) and (b) of the act, and then quoted itself, stating:

> "...it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading

> others into it...In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Middlesex County, 453 US at 14, 69 L.Ed 2d. at 447, 101 S. Ct. at 2623.

It is unreasonable and tortured construction to suggest that an admonition against inclusion of unintended remedies be extended to bar separate, independent and long-standing remedies for damages caused by the tortious misconduct of the government. Legitimate judicial concern about a plethora of "citizen" suits should not result in a loss of individual rights under the Federal Tort Claims Act, whether those claims arise from the negligent operation of a mail truck, or negligent pollution of a privately leased shellfishing ground.

The same principal was enunciated in

Hough v. Marsh, 557 F. Supp 74 (D. Mass-1982) by Judge Nelson, who declined to dismiss a suit against the U. S. Army Corps of Engineers on Middlesex grounds, finding instead that independent bases of jurisdiction were provided under 28 U. S. C. 1331 (a) and the Administrative Procedures Act (5 U. S. C. 701 et seq.).

A fair construction of the complaint (App. p. 2a) can only lead to the conclusion that Roy Davis seeks to recover for damages caused by pollution and that the pollution was caused by the negligence of the United States and the City of Hampton. While the actions of the United States and Hampton may violate the FWPCA, it is the physical pollution of the water, not breach of an administrative standard, for which Davis seeks compensation. There is not even a suggestion that Davis relies upon a

"Federal common law of nuisance", City of Milwaukee v. Illinois, 451 US 304, 68 L. Ed. 2d. 114, 101 S. Ct. 1784 (1981). The interpretation of the Complaint by the Court of Appeals ignores the plain language of the pleading.

It should be remembered that the Federal Tort Claim Act was asserted, in Middlesex, as a basis for jurisdiction, but suit was not instituted in timely fashion. Accordingly, that jurisdictional basis was rejected by the Court of Appeals, National Sea Clammers Association v. City of New York, 616 F 2d 1222 (1980), and never considered by the Supreme Court. However, it is reasonable to construe the Federal Tort Claims Act as somewhat more than an umbrella for nuisance claims. There are certainly no exceptions in 28 U.S.C. § 2680 which would constitute a bar to tort action

against the Federal sovereign for negligent pollution, and the resultant damage.

It is difficult to ignore the language of 33 U.S.C. S 1365 (e) which states:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The decision of the District Court creates an environmental Catch-22; on the one hand, the Court rules that the FWPCA provides citizens an exclusive statuatory basis upon which to institute action for the purpose of terminating pollution; on the other hand, citizens who are damaged by pollution are barred from instituting suit for damages arising from the tortious misconduct of the polluter, in this case the Federal

sovereign and a municipal government.

Title 33, United States Code, § 1365 (e) and the legislative history of the FWPCA specifically rebut that proposition.

In discussing the savings clause of the FWPCA, 33 U.S.C. § 1365(e), the report of the Senate Public Works Committee states as follows:

> "Section 505 (33 U.S.C. § 1365) would provide that a citizen enforcement action might be brought against an individual or a government agency. As recognized under section 313 of the bill, Federal facilities generate considerable water pollution. Since some Federal agencies such as the Department of Defense have failed in abating pollution and in requesting appropriations to develop control measures, citizens can seek, through the courts, to expedite the government performance specifically directed under section 313... It should be noted,

> however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."
>
> United States Code Congressional and Administrative News, 92nd Congress, Second Session, Volume 2, Legislative History, pages 3746 and 3747.

To suggest that the Supreme Court intended to narrow the scope of the FWPCA and constructively limit the number of suits arising thereunder is an acceptable position. To suggest that Middlesex has meaning beyond that proposition is to read far more into Middlesex than the specific language of the Justices would suggest or permit.

It is respectfully submitted that ample reason is provided in the opinions

of the District and Circuit Courts to support the granting of a Writ of Certiorari to Roy E. Davis, under the guideline set forth in Rule 17.1(c), Rules of the Supreme Court. Further, comparable suits are presently docketed in Michigan (Frank J. Kelley et al v. U. S., G-83-630, W. D. Michigan) and Florida (Dickerson, Inc. v. American Electric Corporation and United States, 82-244-CIV-JB, M. D. Fla.). It is reasonable to assume that the issue raised herein will not be settled until the principles enunciated in Middlesex are clarified.

CONCLUSION

For all of the foregoing reasons, Petitioner Roy E. Davis, by counsel, respectfully prays that a Writ of Certiorari issue forth.

Respectfully submitted,

JAMES E. BRADBERRY

D. WAYNE MOORE

MOORE, MOORE & BRADBERRY

13185 Warwick Boulevard

Newport News, Virginia

23602

Counsel for Petitioner